

BILL SMITH COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-473 Decided February 26, 1988

Petition for discretionary review of an order of Administrative Law Judge Joseph E. McGuire (Hearings Docket No. NX 7-35-P) dismissing petition for review of proposed civil penalty assessed for Notice of Violation No. 86-091-092-027(3).

Petition denied; untimely prepayment ordered refunded.

1. Appeals: Jurisdiction--Rules of Practice: Appeals: Generally--Rules of Practice: Hearings--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Prepayment--Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

Timely prepayment of the amount of a proposed civil penalty by one seeking formal review of the penalty before an Administrative Law Judge is essential to establish the jurisdiction of the Hearings Division and the Board of Land Appeals. Where petitioner makes prepayment after the deadline for filing the petition prescribed by 43 CFR 4.1151 and misfiles the prepayment with the Office of Surface Mining Reclamation and Enforcement rather than with the Office of Hearings and Appeals, the petition for review is properly dismissed by the Hearings Division, and the Board of Land Appeals has no jurisdiction to entertain a petition for discretionary review of the order of dismissal.

2. Secretary of the Interior--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure--Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

As a matter of general policy announced by the Secretary of the Interior, if a person seeking administrative review of a proposed assessment of a civil penalty under

SMCRA tenders prepayment of the penalty and if administrative review is subsequently denied because the payment was late or in an inadequate amount, then the amount tendered should be returned to such person and collection should be pursued through normal collection channels. It is inappropriate for the Department to retain the funds when the purpose for which they were remitted is not accomplished.

3. Administrative Authority: Generally--Board of Land Appeals--Secretary of the Interior

The Board of Land Appeals must defer to policies announced by the Secretary of the Interior.

APPEARANCES: Glen B. Rutherford, Esq., Knoxville, Tennessee, for Bill Smith Coal Company; Judith M. Stolfo, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Bill Smith Coal Company (BSCC) has filed a petition for discretionary review of a notice of proposed assessment of a civil penalty of \$3,500 for Notice of Violation (NOV) No. 86-091-092-027(3), issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE). The petition is filed pursuant to section 518 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1268 (1982), and implementing regulations.

The record does not indicate when BSCC first received notice of this proposed assessment from OSMRE. However, the parties both state that, following receipt of such notice, BSCC requested an informal conference with OSMRE on the amount of the civil penalty, and that an assessment conference was subsequently convened. ^{1/}

On March 3, 1987, the Assessment Conference Officer, Knoxville, Tennessee, Field Office, OSMRE, issued a letter notifying BSCC that the assessment conference had been concluded, and that the proposed assessment had been affirmed. This letter was received by BSCC by certified mail on March 6, 1987.

The letter that was sent to BSCC expressly advised as follows concerning the filing of a request for formal hearing:

^{1/} The case record does not contain a copy of the NOV, the notice of proposed assessment, or the assessment conference report issued by OSMRE on Mar. 3, 1987, following its assessment conference with BSCC. Nor is there any indication in the record when the NOV was issued, or when and where the assessment conference was held. However, there is no dispute as to certain facts that provide an adequate basis for considering the petition.

If you wish a formal hearing to contest the affirmed assessments, you must submit a petition for review within fifteen (15) days after the date you receive this letter to:

U.S. Department of the Interior
Office of Hearings and Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

In your petition, you may include a request for a formal hearing on the fact of violations if you have not previously been granted or denied such a hearing. Your petition must be accompanied by a check or money order payable to "Assessment Office-- OSMRE" in an amount equal to the total of the affirmed assessments for which you are requesting a hearing. If you fail to submit the check or money order with your petition, * * * you may forfeit your right to a hearing. * * *

If you do not make a timely request for a hearing with respect to the violations, the affirmed assessments for the violations will become final and will be due and payable within thirty (30) days from the receipt of this letter. Payments should be made by check or money order payable to "Assessment Office--OSMRE" and sent to:

Office of Surface Mining
Reclamation and Enforcement
P.O. Box 360292 M
Pittsburgh, PA 15251

By letter postmarked March 20, 1987, BSCC filed a petition for review of the proposed civil penalty with the Office of Hearings and Appeals (OHA), U.S. Department of the Interior. 2/ However, no check for \$3,500 (the amount of the proposed civil penalty) accompanied the petition for review that was sent to OHA in Arlington, Virginia.

Instead, BSCC sent a check to OSMRE in Pittsburgh, Pennsylvania, thus evidently following the wrong instructions, that is, those applicable if BSCC had decided not to seek formal review with OHA. The record contains nothing directly establishing when BSCC's check dated March 20, 1987, was mailed to OSMRE in Pittsburgh. However, in a letter to Judge McGuire dated April 22, 1987, counsel for BSCC stated that the owner of BSCC had informed counsel that "a check for \$3,500.00 was sent to [Judge McGuire's] office just a few days after the Petition for Review was filed." (Emphasis supplied.) Counsel for OSMRE has argued, and BSCC has not disputed, that this reference was to the check that was actually sent to OSMRE in Pittsburgh, rather than to OHA in Arlington, Virginia. Thus, BSCC's check was mailed a few days after March 20, 1987, and was misdirected to OSMRE in

2/ Petitions for review of proposed civil penalties are received by the Hearings Division, OHA. See 43 CFR 4.1150.

Pittsburgh, instead of to OHA, as directed in OSMRE's letter of March 3, 1987. ^{3/} On April 20, 1987, Administrative Law Judge McGuire dismissed BSSC's petition for review for failure to timely prepay the civil penalty assessment as required by 43 CFR 4.1152(b)(1).

[1] A party seeking formal review and hearing of a notice of proposed assessment of a civil penalty must file a petition for review with the Hearings Division, OHA, within 15 days from service of notice by OSMRE's conference officer that the informal conference has been completed. 43 CFR 4.1151(b). Such petition must be "accompanied by full payment of the proposed assessment" to be placed in an escrow account pending final determination of the assessment. 43 CFR 4.1152(b)(1).

Here, BSCC's petition was timely filed, having been postmarked on March 20, 1987, the 14th day from service of notice on BSCC that the conference was completed, but it was not accompanied by prepayment as required by the regulations. A petition will not be dismissed even where it is not actually "accompanied" by prepayment (1) where prepayment is made within the time period prescribed by 43 CFR 4.1151, and (2) where prepayment is made in the correct office (that is, OHA, in Arlington, Virginia). Fresa Construction Co. v. OSMRE, 101 IBLA ____ (1988). ^{4/} Such was not the case here. First, BSCC's prepayment was untimely by its own admission because the prepayment was mailed "a few days after" the filing of its petition for review, which petition was in turn filed on the next to last day of the time period prescribed by 43 CFR 4.1151(b). Second, the prepayment was misfiled with OSMRE in Pittsburgh, Pennsylvania, rather than with OHA, as required by 43 CFR 4.1150.

In these circumstances, we conclude that BSCC has failed to timely prepay the amount of the proposed civil penalty. It is well established that failure to timely prepay a civil penalty renders OHA (including both the Hearings Division and the Board of Land Appeals) without jurisdiction to review the proposed penalty. 30 U.S.C. § 1268(c) (1982); 43 CFR 4.1152(c); Tri Coal Co. v. OSMRE, 85 IBLA 146 (1985) (and cases cited); C & K Coal Co., 1 IBSMA 118, 86 I.D. 221 (1979). ^{5/} Thus, Judge McGuire properly

^{3/} We reject OSMRE's suggestion that the date of filing of the check may be determined by the date it was processed by the Mellon Bank of Pittsburgh (OSMRE's depository). The fact that the Mellon Bank processed the check on Apr. 1, 1987, establishes only when the check was received in P.O. Box 360292 M, the address specified by OSMRE in its letter of Mar. 3, 1987. The critical date is the date that the envelope containing the check is postmarked. 43 CFR 4.1107(f).

^{4/} Fresa is being decided contemporaneously with this case.

^{5/} Three U.S. Circuit Courts of Appeal have upheld the prepayment requirement against constitutional challenges. Graham v. OSM, 722 F.2d 1106 (3rd Cir. 1983); Blackhawk Mining Co. v. Andrus, 711 F.2d 753 (6th Cir. 1983); B & M Coal Co. v. OSM, 699 F.2d 381 (7th Cir. 1983).

dismissed BSCC's petition for review. Further, the failure to make pre- payment properly deprives this Board of jurisdiction to review BSCC's petition for discretionary review. Accordingly, the petition must be denied.

[2] The Secretary of the Interior has recently considered a case such as the present one, where a party petitioning for formal review of a pro- posed civil penalty misfiled its prepayment. The Secretary stated as follows:

As a matter of general policy, if a person seeking admini- strative review of a proposed assessment of a civil penalty under SMCRA tenders prepayment of the penalty and if administrative review is subsequently denied because the payment was late or in an inadequate amount, then the amount tendered should be returned to such person and collection should be pursued through normal collection channels. It is inappropriate for the Department to retain the funds when the purpose for which they were remitted is not accomplished.

In Re L. W. Overly Coal Co., 94 I.D. 349, 352 (1987).

[3] The Board of Land Appeals must defer to policies announced by the Secretary of the Interior. See A.C.O.T.S., 60 IBLA 1 (1981); Superior Oil Co., 57 IBLA 404 (1981); James R. Learned, 50 IBLA 416 (1980); Stauffer Chemical Co., 49 IBLA 381 (1980).

The circumstances in the instant case fall within the general policy announced by the Secretary, that is, BSCC has been denied administrative review because of late prepayment. Thus, under this policy, the amount tendered must be returned to BSCC. Accordingly, OSMRE is directed to refund \$3,500 to BSCC.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for discretionary review is denied, and OSMRE is directed to refund \$3,500 to the Bill Smith Coal Company.

Will A. Irwin
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Gail M. Frazier
Administrative Judge